SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC2004-000076-001 DT 09/02/2004

HONORABLE MICHAEL D. JONES

CLERK OF THE COURT
P. M. Espinoza
Deputy

FILED:_____

STATE OF ARIZONA

DOUGLAS W JANN

v.

WILLIAM JOSEPH THOMPSON (001)

TODD K COOLIDGE

GLENDALE JUSTICE COURT
REMAND DESK-LCA-CCC

RECORD APPEAL RULE / REMAND

GLENDALE JUSTICE COURT

Cit. No. #2826395

Charge: C) EXTREME DUI-BAC .15 OR MORE

DOB: 03/07/45

DOC: 12/05/02

This Court has jurisdiction of this criminal appeal pursuant to the Arizona Constitution Article VI, Section 16, and A.R.S. Section 12-124(A).

This case has been under advisement since the time of oral argument. This decision is made within 60 days as required by Rule 9.9, Maricopa County Superior Court Local Rules of

Practice. This Court has considered and reviewed the record of the proceedings from the Glendale Justice Court, and the memoranda and arguments submitted by counsel in this case.

Appellant, William Joseph Thompson, appeals from his conviction of the crime of Extreme DUI, a class 1 misdemeanor offense in violation of A.R.S. Section 28-1382(A). Thompson's case was tried to the court without a jury on August 1, 2003, based upon stipulated facts and evidence. Thompson was found guilty, and sentenced on September 10, 2003 to pay a fine and serve the mandatory jail-time. Thompson has filed a timely Notice of Appeal in this case.

The record reflects that Thompson was stopped by Department of Public Safety Officer Brett on December 5, 2002 at 9:10 p.m., at Milepost 205 on Interstate 17.[1] Officer Brett's attention was drawn to the Appellant's vehicle because of its high speed and the fact that he was weaving back and forth within his lane. Officer Brett commenced a DUI investigation after making a traffic stop, and smelling the strong odor of alcohol from Appellant's person, and after Appellant admitted that he had had several glasses of wine. Officer Brett explained that "for reasons of safety" he did not perform any field sobriety tests upon Appellant, because Appellant could not stand up unassisted.[2] The results of the two Intoxilyzer tests revealed blood alcohol contents of .198 and .186, respectively.

The first issue raised by the Appellant is his contention that the trial judge erred in denying his motion to continue the trial date of August 1, 2003. Citing Rule 8.5(G), Arizona Rules of Criminal Procedure, Appellant contends that the trial court must continue a trial when "delay is indispensable to the interests of justice." Appellant had filed a Motion to Continue the trial of August 1, 2003, for the reason that its expert witness, Chester Flaxmayer, was unavailable on the trial date due to his attendance at a seminar out of state. The trial court denied this motion to continue. Appellant's trial counsel reurged the motion to continue at the time scheduled for trial on August 1, 2003. The trial judge denied the renewed motion.

It is appropriate that this Court review the trial court's denial of the continuance in this case, in the context of the case's history before the trial court.[3] The case history reveals that the case was greater than 200 days old (as of August 1, 2003), and that three previous motions to continue had been granted at the request of Appellant's trial counsel. The age of the case and the number of the prior motions to continue were cited by the trial judge at the time he denied Appellant's renewed motion to continue the trial on August 1, 2003.[4] The trial judge (the

[1] The record submitted to this court includes the stipulated evidence submitted to the trial judge and that evidence includes the departmental reports of Officer Brett, his narrative report, the alcohol influence report, and the intoxilyzer breath-test readings of .198 and .186.
[2] Record on Appeal, Arizona Department of Public Safety Offense Report 2002-084415, at pages 1-2.
[3] State v. Lamar, 205 Ariz. 431, 437, 72 P.3d 831, 837 (2003); State v. Barreras, 181 Ariz. 516, 892 P.2d 852 (1995); State v. Amaya-Ruiz,166 Ariz. 152, 800 P.2d 1260 (1990).
[4] Record on Appeal, tape cassette of the proceedings of August 1, 2003.

Honorable Quentin V. Tolby, Glendale Justice of the Peace) succinctly and correctly concluded, when he denied Appellant's renewed Motion to Continue:

> The court doesn't believe that Mr. Flaxmayer is the only criminalist in the State of Arizona. And, I don't believe that Mr. Flaxmayer's (schedule) should be allowed to dictate trial scheduling….[5]

Rule 8.2(a)(2), Arizona Rules of Criminal Procedure, requires that criminal defendants released from custody be tried within 180-days from the date of arraignment. As this rule is not written as a suggestion, nor in the permissive sense, its requirements must be understood to be a mandatory directive to trial attorneys and judges. In fact, the only exception to this mandatory time limit is found in Rule 8.2(d), which authorizes continuances granted in accordance with Rule 8.5, Arizona Rules of Criminal Procedure. A trial court may only grant a continuance "…upon a showing that extraordinary circumstances exists and that delay is indispensable to the interests of justice (emphasis added)."[6]

Article II, Section 24 of the Arizona Constitution, guarantees the concept of a criminal defendant's right to a speedy trial. Article II, Section 2.1(A)(10) guarantees victims the right to a speedy trial. It is a trial judge's responsibility to balance these rights, keeping in mind the trial court's responsibility to control and effectively manage its docket and calendar.[7] It is a criminal defendant's responsibility to subpoena and schedule the testimony of its expert witnesses. This may include having an alternative expert on-call. Where scheduling conflicts can be foreseen and avoided through the diligence of counsel, continuances may be avoided.[8]

In a similar case, the Arizona Supreme Court upheld a trial judge's ruling denying a criminal defendant's motion to continue a sentencing hearing, when its expert was not available:

> There was no error in denying the continuance. The judge made it clear from the outset that defense counsel was responsible for insuring Dr. Tatro's presence when the State's expert testified. Defense counsel knew in advance that Dr. Tatro might not be available on the hearing's second day. He could have but did not ask the court to schedule the first day's witnesses accordingly. Moreover, defense counsel requested a continuance of at least six days when Dr. Bayless was present and prepared to proceed.

[5] Id.
[6] Rule 8.5(b), Arizona Rules of Criminal Procedure.
[7] State v. Lamar, 205 Ariz. at 436, 72 P.3d at 836; State v. Barreras, 181 Ariz. at 520, 892 P.2d at 856.
[8] State v. Vasko, 193 Ariz. 142, 971 P.2d 189 (App. 1998); State v. Heise, 117 Ariz. 524, 573 P.2d 924 (App. 1977).

> Considering all these factors, the judge acted well within the latitude that trial court's need to manage their dockets.[9]

This Court must review the trial court's order denying Appellant's Motion to Continue only for an abuse of discretion.[10] There is no abuse of discretion unless the trial court's actions "substantially prejudiced the defendant."[11]

This Court concludes that the trial judge did not err in denying Appellant's requested continuance. It is clear from the record that Appellant's arguments before the trial court (as well as those before this court) fall far short of establishing that Appellant was prejudiced by the denial of his requested continuance. Appellant argued to the trial judge that Chester Flaxmayer was a material and indispensable witness. Flaxmayer is a criminalist whom Appellant intended to call as a witness to cast doubt upon the reliability of the Intoxilyzer machine and the blood alcohol readings obtained from the machine. Appellant made no attempt to secure the attendance of another criminalist, who presumably could testify as to the same scientific principles and/or infirmities inherent in the breath analysis process. The record also reveals that no subpoenas were issued to compel the attendance of Chester Flaxmayer. This fact indicates that Appellant's trial counsel was not serious in securing Flaxmayer's attendance at trial, or that he was not essential to the defense. Finally, the particular facts of this case indicating that Appellant was literally "falling down drunk" and unable to stand unassisted, indicate that the testimony of an expert casting doubt on the Intoxilyzer machine would be of little trial utility, given the strength of Officer Brett's personal observations and Appellant's own admissions on the issue of guilt.

The remaining issue raised by the Appellant concerns the sufficiency of the evidence to warrant the finding of guilt. Specifically, Appellant contends that insufficient evidence was submitted on the "(A)(2) charge".[12] However, the record reveals that Appellant was not found guilty, nor was a judgment of guilt entered, as to this charge. It was dismissed. A judgment of guilt was entered only as to the charge of Extreme DUI. Even construing this argument as applying to the Extreme DUI charge, Appellant's trial counsel stipulated to the admission in evidence of the results of the Intoxilyzer, including the Intoxilyzer's two read-outs of .198 and .186. Given the substantial other evidence of Appellant's guilt, this Court finds clear and substantial evidence exists to support the finding of guilt, and no error.

IT IS THEREFORED ORDERED affirming the judgment of guilt and sentence imposed by the Glendale Justice Court in this case.

---

[9] State v. Barreras, 181 Ariz. at 520, 892 P.2d at 856.
[10] Id.; State v. Amaya-Ruiz, supra.
[11] State v. Barreras, 181 Ariz. at 520, 892 P.2d at 856, quoting State v. Clabourne, 142 Ariz. 335, 342, 690 P.2d 54, 61 (1984).
[12] A.R.S. Section 28-1381(A)(2), Driving With a Blood Alcohol Content of .08 or Greater.

IT IS FURTHER ORDERED remanding this case back to the Glendale Justice Court for all further and future proceedings in this case.

IT IS FURTHER ORDERED designating this opinion for publication pursuant to Rule 9.11, Maricopa County Superior Court Local Rules of Practice.

/s/ HONORABLE MICHAEL D. JONES

JUDICIAL OFFICER OF THE SUPERIOR COURT